IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORP. SECURITIES DERIVATIVE, & "ERISA" LITIGATION	MDL-1446
MARK NEWBY, ET AL., Plaintiffs, vs. ENRON CORP., ET AL., Defendants	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES

ORDER ON ARTHUR ANDERSEN LLP'S AND ARTHUR ANDERSEN INDIVIDUALS' MOTION FOR PROTECTION FROM BANKRUPTCY RULE 2004 SUBPOENAS

Arthur Andersen, LLP, (Andersen), John Stewart, Benjamin Neuhausen, Carl Bass, Debra Cash, and Patricia Grutzmacher (collectively, the "Andersen Individuals") have moved for an order quashing or for protection from Bankruptcy Rule 2004 subpoenas issued to them by Neal Batson, the Bankruptcy Examiner for the Enron Corporation bankruptcy estate ("the Examiner").

The Honorable Arthur J. Gonzalez, Bankruptcy Judge of the Southern District of New York issued an order on April 8, 2002 authorizing Rule 2004 Examinations by the Examiner appointed in the Enron bankruptcy case pending in the United States Bankruptcy Court for the Southern District of New York.

On February 5, 2003 the Examiner moved, pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure for an examination as set forth in paragraph 9 of the Motion, which said, in pertinent part:

> a. First, the Examiner seeks oral testimony from present and former partners, members, employees, and representatives

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> of the entities listed in Exhibit A, attached hereto, including Andersen and certain law firms that are or have been involved in various transactions with the Debtors or the SPEs, based on information provided by the Debtors to the Examiner.

Third Motion of Neal Batson, The Examiner, Pursuant to Federal Rule of Bankruptcy Procedure 2004 For an Order Directing Production of Documents And Oral Examinations, Case No. 01-16034 (AJG), Chapter 11, In the United States Bankruptcy Court for the Southern District of New York, February 5, 2003, at 6.

On February 27, 2003 Judge Gonzalez issued an order pursuant to 11 U.S.C. Sec. 1103(c) and Fed. R. Bankr. P. 2004 authorizing the examiner to issue subpoenas for Rule 2004 Examinations and Production of Documents. Specifically he held:

> Upon the Motion dated February 5, 2003 of . . . the Examiner appointed in these cases. . ., pursuant to Rule 2004 of the . . .Bankruptcy Rules. . .for an examination of the parties listed in paragraph 9 of the Motion (the "Third Rule 2004 Examinees"); and finding that good cause exists to grant the Motion and . . .finding that notice of the motion is adequate, and that no further notice is necessary; accordingly, it is hereby ORDERED . . . .the Motion is granted. . . .

Order, Under 11 U.S.C. Sec. 1103(c) and Fed. R. Bankr. P. 2004, Authorizing and Directing Neal Batson, the Examiner, to Issue Subpoenas for Rule 2004 Examinations and Production of Documents, February 27, 2003.

It is important to note that this order was issued after the second of the Examiner's two reports, which Andersen and the Andersen Individuals argue are so extensive that the reports themselves are evidence that the Examiner needs no further discovery. It is also important to note that the Examiner is required by Judge Gonzalez to submit his Third Interim Report by June 30, 2003. It is in order to compose that report that the Examiner seeks the discovery at issue here. The Examiner maintains that "The scope and subjects upon which the Examiner now seeks the testimony of the Witnesses are germane to the ongoing investigation and are *not* duplicative of any efforts and/or material previously obtained throughout the course of this Examination." Response of Neal Batson, the Enron Corp. Examiner, to Arthur Andersen LLP's and Arthur Andersen Individuals' Motion for Protection From Bankruptcy Rule 2004 Subpoenas. Instrument No. 1407, at 4

Pursuant to Judge Gonzalez February 27, 2003 Order the Examiner issued seven subpoenas, all of which were accepted by Andersen and the Andersen Individuals. Five of the subpoenas were directed at the Andersen Individuals and the other two were directed at Andersen and sought documents and Rule 30(b)(6) testimony. The witnesses have agreed to make this discovery available to the Examiner, but balk at giving testimony because "the topics include almost every material transaction at issue in the *Newby* Litigation." Arthur Andersen LLP's and Arthur Andersen Individuals' Motion for Protection from Bankruptcy Rule 2004 Subpoenas, Instrument No. 1386, at 11.

Andersen and the Andersen Individuals argue that there are four reasons why the Rule 2004 Subpoenas for their depositions should be quashed.

First they argue that Rule 2004 discovery is available only to provide the Examiner with sufficient information to determine whether the estate has valid claims to assert, and that the Examiner has enough information for that purpose. He should not be permitted to continue using Rule 2004 discovery for information from Andersen and the Andersen Individuals.[1]

The Examiner responds with three key points. First, he maintains that he is conducting an investigation not just to identify claims, but also to carry out the broad mandate of Judge Gonzalez's April 8 Order, which authorized and directed the inquiry into

> all transactions (as well as all entities, as defined in the Bankruptcy Code, and pre-petition professionals involved therein): (i) involving special purpose vehicles or entities created or structured by the Debtors or at the behest of the Debtors, that are (ii) not reflected on Enron's balance sheets, or that (iii) involve hedging using Enron stock, or (iv)

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[1]Andersen and the Andersen Individuals attach to their Motion four volumes of exhibits, much of which consists of statement of fees and summary sheets filed by the examiner and his attorneys in order to recover their fees for the work of the Examiner. These demonstrate the amount of discovery that the Examiner has undertaken.

> as to which the Examiner has the reasonable belief are reflected, reported or omitted in the relevant entity's financial statements not in accordance with generally accepted accounting principles, or that (v) involve potential avoidance actions against any pre-petition insider or professional of the Debtors.

April 8 Order, at 2

Second, the Examiner also points to 11 U.S.C. Sec. 1106(a)(4)(A), which requires the Examiner to report on "fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate."

Finally, the Examiner points out that the two reports he has made were based on documents and other material evidence available to him when the reports were made. He is now seeking testimony and documents from Andersen and the Andersen Individuals that he has not yet reviewed or analyzed. He has not even spoken with the witnesses he has subpoenaed.

2. Andersen and the Andersen Individuals next argue that the Creditors Committee in the Enron bankruptcy has sued Andersen and has sued various former Enron officers asserting claims of fraudulent accounting, the issue on which the Examiner seeks to examine the Andersen Individuals. Because these adversary proceedings "affect" the Andersen and Andersen Individuals, the Rule 2004 subpoenas should be quashed.

The Examiner asserts that he is not a party to either the *Newby* or Fastow litigation. Because of that fact, he is not prohibited from continuing to use Rule 2004 discovery to fulfill his duties to the bankruptcy court. He points out that the cases cited by Andersen and the Andersen Individuals involved the same individual who had sought to initiate the adversary proceedings and simultaneously conduct a Rule 2004 examination in the bankruptcy. *Cf. In re Blinder*, 127 B.R. 267,273 (D. Colo. 1991). This Court dealt with such a situation in its December 12, 2002 (Instrument No. 1184) order involving an attempt by the Creditors' Committee to take Rule 2004 discovery after having instituted

a lawsuit. Andersen and the Andersen Individuals argue that because the Creditors' Committee and the Examiner share a common interest they should be treated the same. The Examiner points out, however, that the two serve different functions. The Creditors' Committee owes a fiduciary duty to the creditors, but examiners are information seekers who are to remain neutral parties. *Cf. Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 513 (S.D.N.Y. 1994); *Kovalesky v. Carpenter,* 1997 WL 630144 at *3 (S.D.N.Y. Oct. 9, 1997). The Examiner is not a litigant in any law suit, and the order appointing him provided him with no authority to file lawsuits. He has demonstrated his willingness to extend the "Discovery Sharing Stipulation" that prohibits sharing of Rule 2004 discovery with the Creditors' Committee and other entities, just as he did when similar concerns were raised by the "Officer Defendants." *Cf.* March 12, 2003 Order (Instrument No. 1275).

3. The burden on Andersen and the Andersen Individuals argue that the burden on them outweighs the benefit of the examinations to the Enron estate. The reasoning is that because the Examiner has no need for the Rule 2004 discovery, any benefits he might gain from it would be outweighed by the burden and expense on Andersen and the Andersen Individuals. The essence of the argument is that Andersen and the Andersen Individuals have been already subjected to a great deal of discovery and that, given the amount of litigation pending against them and others, they will be subjected to further discovery, notably, duplicate depositions. This possibility is, unfortunately, likely. true. In a perfect world there would be one investigation, one production of documents, one set of depositions. This is not a perfect world, however, and no matter how preferable it would be to do everything one time and be done with it, the fact remains that the bankruptcy is separate from the civil litigation. The Examiner is on a different time table; he must file his report by June 30, 2003. There is simply no alternative to his taking the depositions he needs now, even if that means the witnesses may need to be deposed again. The Examiner is subject to confidentiality orders and a "Discovery

Sharing Stipulation." Although it may be that at some point these will be lifted or waived, at this time the parties to the litigation cannot participate in the Rule 2004 discovery proposed by the Examiner. Nor, would it seem, are the civil litigants ready to participate in depositions at this time because the discovery stay of the Private Securities Litigation Reform Act (PSLRA) has only recently been lifted. Granting the motion of Andersen and the Andersen Individuals would merely serve to delay the Examiner's lawful discovery.

4. Finally Andersen and the Andersen Individuals argue that even if the Rule 2004 discovery is deemed proper in principle, the discovery should be co-ordinated with the depositions in the *Newby* litigation, thus preventing unfair and burdensome duplicative discovery from Andersen and the Andersen Individuals. As the Court has pointed out under Number 3, above, co-ordinating discovery is impossible at this time. Judge Gonzalez's September 12, 2002 Order does state in paragraph 18

> With respect to those persons or entities that are parties in the consolidated civil action before Judge Harmon in the Southern District of Texas. . . .the Committee, Examiner and Debtors are directed to coordinate, to the extent practicable, the discovery authorized herein with any discovery in the consolidated class action in the event the PSLRA stay is lifted.

Andersen and the Andersen Individuals argue that this language means that the Examiner must co-ordinate discovery and failure to do so means he is not entitled to discovery. Judge Gonzalez qualifies the directive in the order to mean that "to the extent practicable," discovery should be co-ordinated with the parties in the consolidated class action. Because of the different time limitations in each court, however, it is not practicable, at this time, to co-ordinate the Rule 2004 discovery noticed for these witnesses.

In their reply to the Examiner's response to their motion for protection Andersen and the Andersen Individuals raise an additional argument for the likelihood that they could face duplicative discovery. The Examiner has recently informed the Bankruptcy Court that he and his law firm have conflicts of interest as to three banks and two accounting firms that preclude him from making findings as to those parties. Andersen and the Andersen Individuals raise the prospect of a second examiner, appointed to take care of the conflict, who subpoenas them for a second round of depositions. Such a specter can be dealt with at the time, if ever, it arises.

In conclusion, the Court finds that Andersen and the Andersen Individuals have failed to demonstrate that there is any reason why this Court should countermand Judge Gonzalez's February 27, 2003 authorization for the issuance of these subpoenas. Accordingly, it is hereby

ORDERED that Arthur Andersen LLP's and Arthur Andersen Individuals' Motion for Protection from Bankruptcy Rule 2004 Subpoenas is DENIED. It is further

ORDERED that Neal Batson, the Examiner, shall EXTEND the "Discovery Sharing Stipulation" to Arthur Andersen, LLP, John Stewart,Benjamin Neuhausen, Carl Bass, Debra Cash, and Patricia Grutzmacher. It is further

ORDERED that Arthur Andersen, LLP, John Stewart, Benjamin Neuhausen, Carl Bass, Debra Cash, and Patricia Grutzmacher SHALL APPEAR for their depositions on the date and at the time scheduled by the Examiner. Depositions that were not given because of the pendency of this motion SHALL BE RESCHEDULED as soon as possible.

Signed at Houston, Texas, this 29th day of May, 2003.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE